IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 126 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESHBHAI BHAGWANBHAI MOCHI SON - Appellant(s)
Versus
ADARIYANA GRAM PANCHAYAT - Defendant(s)

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Appearance :
MR RA MISHRA for Appellant(s) : 1, 1.2.1, 1.2.2,1.2.3
MR ASHISH M DAGLI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 29/09/2006

ORAL JUDGMENT

1. The appeal is admitted for hearing on the following substantial question of law;

(i) Whether on the facts and in the circumstances of the

case the judgement and decree delivered by the first appellate court are null and void, as the same have been delivered against respondent who died on 15/1/2001 and his legal representatives were not brought on the record?

2. It is not in dispute before me that Mochi Bhagwanbhai Narshibhai was original plaintiff, he had filed Regular Civil Suit No.78 of 1993 seeking permanent injunction against the present respondent – defendant. The Regular Civil Suit No.78 of 1993 was decreed by the learned trial court. Being aggrieved by the said judgement and decree, the present respondent Adariyana Gram Panchayat filed an appeal which was registered as Regular Civil Appeal No.5 of 2000. During the pendency of the appeal, the plaintiff (respondent in the regular first appeal) died on 15/1/2001. It appears that neither party brought the fact to the notice of the appellate court that the respondent before it died on 15/1/2001. The learned trial court heard the parties somewhere in August / September, 2003 and allowed the appeal vide its judgement and order dtd.13/9/2004. Being aggrieved by the said judgement and decree, the appellants are before this Court.

3. Learned counsel for the appellants submit that it is trite law that no judgement either in favour or against the interest of a dead man can be delivered by Court. According to him if the respondent plaintiff who had secured decree in his favour was dead then the records were required to be corrected and only after substitution of the legal representatives, Court could assume jurisdiction to deliver a judgement. He also submits that technically speaking the appeal had already abated and in an abated matter, court would have no jurisdiction to deliver the judgement. The short submission of the appellants is that on this ground alone the judgement and decree delivered by the learned first appellate court deserves to be set aside.

4. Learned counsel for the respondent on the other hand submitted that if the counsel engaged by the respondent did not bring the fact of death to the notice of the appellants' counsel, nor to the notice of the Court then, the parties or the judge could not presume that the respondent was dead. He, however, submits that as there was proper representation through counsel, the

judgement would not be a nullity. He also submits that in some of the identical cases some private parties filed appeals which have already been disposed of by this Court with certain directions and with the same observations and directions, this appeal can also be disposed of.

5. After hearing the parties, I am of the considered opinion that the judgement and decree delivered by the learned first appellate court cannot be sustained or maintained because, a court would have jurisdiction to decide a matter only when the record is corrected and each party is served and is represented. It would altogether be a different thing that a party despite the service, may not appear in the court, but in case of a person who is a sole respondent, it would always be a duty cast upon the appellant to substitute the legal representatives. A judgement against a dead person would not be allowed to stand because interest of a deceased cannot be represented by anybody. Vakalatnama issued by such person comes to an end immediately on his death. In the present matter, the respondent died on 15/1/2001 and the judgement was delivered on 13/9/2004.

6. Strictly speaking, on expiry of 90 days from the date of the death, the appeal had already abated and in an appeal which stands abated, a Court would have no jurisdiction to proceed in the matter. It would, however, be altogether a different thing that even in an abated matter, a party may make an application for substitution of the legal representatives, setting aside of abatement and extension of time for making such application. If such applications are filed then the Court which has jurisdiction to consider the application, will have to decide the applications on their own merits without being influenced by the merits of the matter. Taking into consideration the legal position, I must answer the question in favour of the appellants. It is accordingly answered. The judgement and decree dtd.13/9/2004 passed by the learned 2nd Joint District Judge, Dhrangadhra are accordingly set aside and the matter is remanded to the first appellate court for proceeding in accordance with law.

7. The parties present in this Court are directed to appear before the trial court on 16/11/2006. If advised, the present respondent may make applications for

substitution of legal representatives, setting aside of abatement and extension of time. The first appellate court shall take into consideration the provisions contained in Rule 4(a) of Order XXII and the fact that upto the date of the judgement, the fact of the death was not brought to the notice of the appellants before the appellate court and therefore, no applications could be filed because the present appellants had come to this Court in this Second Appeal. The respondent of this Court, sole appellant in the appellate court would also be entitled to rely upon the judgement which has been delivered by this Court in identical case.

8. The appeal is allowed in the terms aforesaid. The records be returned back to the learned first appellate court.

(R.S. GARG, J.)

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